IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 805 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KOYABHAI BHAICHANDBHAI

Versus

STATE OF GUJARAT

Appearance:

MS KRISHNA U MISHRA for Petitioner

Mr.K.C.Shah, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 27/09/2000

ORAL JUDGEMENT

1. The prayer of the petitioner in this petition is for a direction to the respondents to release the petitioner on his first furlough leave by imposing suitable conditions.

2. Brief facts giving rise to this petition are as under :

The petitioner was convicted under Section 302 I.P.Code and was sentenced to under-go life imprisonment. His Appeal was dismissed by this Court. During pendency of the trial the petitioner was enlarged on parole twice and he surrendered in time. After conviction he was released on temporary bail, but he surrendered late by 462 days for which the petitioner was sufficiently punished by the Authorities. The petitioner applied for first furlough leave to I.G.(Prison) - respondent No.3, on 1.4.2000 which was rejected on 18.8.2000, as contained in Annexure : A. It is this order which is under challenge in this petition.

3. The counter Affidavit has been filed by Shri U.V.Chaudhary, Administrative Officer of I.G.(Prison).

4. Learned Counsel for the petitioner Ms.Krishna Mishra and Shri K.C.Shah, learned A.P.P. have been heard.

5. The contention of the learned Counsel for the petitioner is that the impugned order is illegal inasmuch as for late surrender earlier by 462 days the petitioner was already punished and as such there cannot be double punishment for the same by rejecting the prayer for furlough leave. Reliance has been placed upon a Division Bench pronouncement of this Court in Rodaji Mahaji v/s. State, reported in 1991 (1) G.L.R. 648. As against this Shri K.C.Shah, learned A.P.P. has contended that the impugned order is not illegal and is in accordance with the provisions of Section 4(10) of the Prison (Bombay Furlough and Parole) Rules, 1959 (for short "the Rules").

6. In order to obtain definite information regarding grounds of rejection counter Affidavit was demanded which has beeen filed today. Perusal of the counter Affidavit shows that the furlough leave was not rejected mainly on the ground of delay in surrender earlier by 462 days. In Para : 3 of the counter Affidavit it is mentioned that under the orders of this court the petitioner was enlarged on bail for a period of 21 days with effect from 7.11.1996 and after expiry of this period of 21 days he did not surrender rather absconded and the police, after a period of 462 days could catch hold of the petitioner and brought back to Sabarmati Jail on 4.3.1998. The grounds for rejection of furlough leave are actually contained in Para : 4 of the counter Affidavit. On receipt of application for furlough leave the office of

the respondent No.3 called a report from D.S.P., Himatnagar, District Sabarkantha. In order to submit this report the police recorded statements of various persons including the victim of the rape Masiben Nathabhai on 30.6.2000. The extract of her statement has been mentioned in this Counter Affidavit wherein she apprehended that if the petitioner is released on furlough leave it will cause danger to her life as well as the life of her family members. She also stated that the petitioner is a head-strong person and there is all likelihood of danger to the life of the victim and her family members. Not only this, one Nathabhai Kalubhai in his statement recorded on 30.6.2000 pointed out that if the petitioner is released on furlough leave their life will also be in danger because the petitioner is a head strong person. The father of the victim also made similar statement apprehending danger to his life and the life of his family members including the victim. On these statements adverse against the petitioner that the D.S.P., Himatnagar, reported that if the petitioner is enlarged on furlough he will not surrender in time in view of his past conduct of late surrender of 462 days and further because there is likelihood of breach of peace release on furlough was rejected. If what is contained in Para : 4 of the counter Affidavit is taken into consideration it would indicate that the furlough leave was not rejected on the ground of late surrender by 462 days. Consequently the order of rejection was not based on Section 4(10) of the Rules. On the other hand it seems that the order of rejection was based on Section 4(4) of the Rules which provides that the prisoners whose release is not recommended in Greater Bombay by the Coimmissioner of Police and elsewhere, by the District Magistrate on the ground of public peace and tranquility. Concluding para : 4 of the counter Affidavit shows that the D.S.P., Himatnagar, after considering the statements of the three witnesses was definitely of the view that in case the petitioner is enlarged on furlough there is likelihood of breach of peace. No doubt earlier conduct of the petitioner was mentioned in this para that earlier he surrendered late by 462 days, but that was not the ground or sole ground for rejection of furlough leave application. On the other hand that was a ground for considering the conduct of the petitioner and also the ground for considering that after committing breach of peace the petitioner may abscond and may not surrender after the furlough leave period expires. Consequently Section 4(10) of the Furlough Rules is not attracted. However, Section 4(10) provides that inter-alia the following categories of prisoners shall not be considered for release of furlough when they have at any time

escaped or attempted to escape from lawful custody or have defaulted in any way in surrendering themselves at the appropriate time after release on parole or furlough. No furlough was claimed by or granted to the petitioner earlier. Consequently it cannot be said that the order of rejection was based under Sub.Section 10 of Rule : 4.

7. Learned Counsel for the petitioner has placed reliance upon a Division Bench pronouncement of this Court in Rodaji Mahaji v/s. State of Gujarat, reported in 1991 (1) GLR 648. This case is distinguishable on facts. In this case the petitioner committed a jail offence during the period he was under-going imprisonment consequent upon awarding sentence for committing substantive offence. The petitioner himself contended in that case that punishment of forfeiture of furlough was not imposed and the Authorities have refused furlough in 1988 on the ground that he has committed jail offence. On these facts this Court observed that once the petitioner is punished for his prison offence the matter of prison offence will rest there and any other punishment thereafter for the same act or misconduct is barred. It was in this context that the rule of double jeopardy was applied in this case. In this case the Division Bench has also mentioned the decision of the Full Bench in Bhikhabhai Devshi v/s. State of Gujarat, reported in 1987 (2) GLR 1178. In this case also it was observed that when the punishing Authority is considering jail offence and the quantum of punishment takes into consideration the gravity of offence and commensurate punishment and it is open to the punishing Authority to impose punishment of forfeiture of furlough with or without combining other punishment. The Full Bench further proceeded to observe that if the provisions of Rule : 4(10) are held to be mandatory making prisoners automatically disqualified and ineligible for furlough in all cases of late surrender, that provision would be clearly inconsistent with Section 48 of the Prisons Act and both cannot stand together. The Full Bench further concluded that the punishing Authority may decide to impose punishment other than the punishment of forfeiture of furlough having regard to the facts, circumstances and the gravity of late surrender. In such cases, according to the Full Bench, furlough will remain due to the prisoner. This case is also distinguishable because on facts it is found that the respondent No.3 has not rejected furlough leave application of the petitioner merely on the ground of earlier late surrender rather the ground of earlier late surrender was considered as one of the possibility that after committing breach of peace the petitioner may abscond. Consequently the Authority did

not commit any illegality in rejecting the petitioner's furlough leave application.

8. The petition is therefore devoid of merit which is hereby dismissed.

sd/-

Date : September 27, 2000 (D. C. Srivastava, J.)

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